STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[redacted]

AMENDED DECISION

MRA-40/109148

PRELIMINARY RECITALS

Pursuant to a petition filed January 14, 2010, under *Wis. Admin. Code* § HA 3.03(1), to review a decision by the Milwaukee County Department of Human Services in regard to Medical Assistance, a hearing was held on February 25, 2010, at Milwaukee, Wisconsin. A decision was issued on April 14, 2010 that declined to increase the spousal asset allocation. A rehearing was requested and granted. Though a new hearing was scheduled it was rescheduled. Nonetheless, it appears to the undersigned, writing this on behalf of the originally assigned ALJ, that this case may be resolved without hearing given the supplements to the record noted below. The attorney for Petitioner was contacted and did supplement the record to bring it up to date.

The issue for determination is whether resources may be reallocated to the Petitioner 's community spouse under the spousal impoverishment rules.

There appeared at the original hearing the following persons:

PARTIES IN INTEREST:

Petitioner:

[redacted]

Petitioner's Representative:

Attorney Angela F. Schultz
2675 North Mayfair Road, Suite 420
Wauwatosa, WI 53226

Also appearing:
[redacted], Petitioner's wife
[redacted], Petitioner's daughter

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703
By: Andrea Brown, ESS
Milwaukee County Department of Human Services
1220 W. Vliet Street
1st Floor, Room 106
Milwaukee, WI 53205

ADMINISTRATIVE LAW JUDGE:
Michael A. Greene
Division of Hearings and Appeals

NOTE: Due to staffing issues, ALJ Greene was unable to write this decision. Consequently, this decision was written by ALJ David D. Fleming, on ALJ Greene's behalf. This decision was based upon the record created at the original hearing along with the supplements noted herein.

Additions to the original are underlined and deletions are shown as strike outs.

FINDINGS OF FACT

1. Petitioner (CARES # [redacted]) ~~is~~ was, at all times relevant here, an institutionalized resident of Milwaukee County. His spouse, Patricia, lives~~-ed~~ in the community at all times relevant here.

2. On December 7, 2009, Petitioner applied for Long Term Care Medical Assistance.

3. Petitioner's gross monthly income is $1,117.40 from Social Security plus a small pension of $39.61, for a total of $1,157.01. Patricia receives $688.40 per month in Social Security benefits.

4. On January 11, 2010, the county agency sent Petitioner a notice of decision advising him that his application for Long Term Care Medical Assistance had been denied due to excess assets. The agency determined that Petitioner and his spouse had counted assets of $423,446.20, well in excess of the applicable limit of $111,560.00.

5. On January 14, 2010, Petitioner filed an appeal with the Division of Hearings and Appeals seeking a reallocation of assets to Petitioner 's community spouse in order to provide him with income from the assets for her support and maintenance needs.

6. As of September 1, 2009, Petitioner 's "income-producing" assets were as follows (Exhibit 2):

Countable Asset	Value as of 9/1/2009	Monthly Income
Associated Bank Savings 21297	$906.98	$0.07
Associated Bank Savings 400007	784.94	0.06
Associated Bank Savings 400008	29,190.59	2.43
Associated Bank Savings 1077498	495.00	0.04
Associated Bank Savings 21296	84,964.76	7.08
Associated Bank Checking 624573	21,947.85	2.73
Associated Bank CD 100059700	10,000.00	19.83
Associated Bank CD [redacted]	16,190.88	17.40
Associated Bank CD [redacted]	19,277.78	38.23
Associated Bank CD [redacted]	11,934.04	9.95
Associated Bank CD [redacted]	10,000.00	6.25
Associated Bank Savings 40006322	6,667.85	0.55
US Bank Savings 359000115	65,265.84	5.31
Equitable Bank Savings [redacted]	114,245.51	38.08
Apple Tree Credit Union [redacted]	2,209.66	0.45
TOTALS	**393,981.68**	**148.46**

7. Petitioner passed away on May 1, 2012.

8. There have been no changes in circumstances since the original hearing that would impact eligibility.

9. The period for which Petitioner privately paid for institutional care was September 2009 through March 2010.

DISCUSSION

The federal Medicaid Catastrophic Coverage Act of 1988 (MCAA) made extensive changes to state Medicaid (MA) eligibility determinations related to spousal impoverishment. In such cases an "institutionalized spouse" resides in a nursing home or in the community pursuant to MA Waiver eligibility, and that person has a "community spouse" who is not institutionalized or eligible for MA Waiver services. See, Wis. Stat. §49.455(1).

The MCAA established a new "minimum monthly needs allowance" for the community spouse at a specified percentage of the federal poverty line. This amount is the amount of income considered necessary to maintain the community spouse in the community. After the institutionalized spouse is found eligible for MA coverage, the community spouse may, however, prove through the fair hearing process that he or she has financial needs above the "minimum monthly needs allowance" based upon exceptional circumstances resulting in financial duress. Wis. Stat. §49.455(4)(a).

When initially determining whether an institutionalized spouse is eligible for MA, county agencies are required to review the combined assets of the institutionalized spouse and the community spouse. See the *Medicaid Eligibility Handbook*, §18.4, *et. seq*. All available assets owned by the couple are to be considered and a Community Spouse Asset Share (CSAS) is determined. Homestead property, one vehicle, and anything set aside for burial are exempt from the determination. The couple's total non-exempt assets then are compared to the sum of the CSAS and $2,000 to determine the institutionalized spouse's eligibility for MA.

The Minimum Monthly Maintenance Needs Allowance (MMMNA) is the established amount that the MA program allows a community spouse based upon what has been determined necessary to allow that spouse to continue residing in the community. Where necessary, the CSAS may be increased through the fair hearing process if the assets allocated to the CSAS do not generate sufficient income on a monthly basis and additional resources are necessary to raise the community spouse's income to the MMMNA . *Wis. Stats*. § 49.455(8)(d), *Wis. Admin. Code* § HFS 103.075(8)(c). In the current case, the MMMNA is $2,428.33. After allocating all of Petitioner's income (less a personal needs allowance and Medicare, prescription and medical insurance premiums) to Patricia, her monthly income is $1,739.93, and is short of the MMMNA by $859.84 per month. Petitioner's counsel asserts that all of the resources may be re-allocated to the community spouse because her income is well below the applicable minimum monthly needs allowance, and that when all of the asset-derived income is allocated to her, she remains below the minimum monthly needs allowance.

Under *Wis. Stats.* §49.455(6)(b)3., assets above the community spouse's CSAS may be allocated to the community spouse through the fair hearing process, if income-producing assets exceeding the asset limit are necessary to raise the community spouse's monthly income to the minimum monthly needs allowance. *Wis. Stats.* §49.455(6)(b)3 explains this process, and subsection (8)(d) provides in its pertinent part:

> If either spouse establishes at a fair hearing that the community spouse resource allowance determined under sub. (6)(b) without a fair hearing does not generate enough income to raise the community spouse's income to the minimum monthly maintenance needs allowance under sub.

(4)(c), the department shall establish an amount to be used under sub. (6)(b)3 that results in a community spouse resource allowance that generates enough income to raise the community spouse's income to the minimum monthly maintenance needs allowance under sub. (4)(c).

Based upon the above, an Administrative Law Judge can override the mandated asset allowance by determining assets in excess of the allowance are necessary to generate income up to the minimum monthly maintenance needs allowance for the community spouse. Therefore, the above provision has been interpreted to grant an Administrative Law Judge the authority to determine an applicant eligible for MA even if a spousal impoverishment application was initially denied based upon the fact the combined assets of the couple exceeded the spousal impoverishment asset limit.

The evidence on this record establishes that the Petitioner and his wife owned assets with a total value of $393,981.68, and that these assets all generate income. There is no question as to the value of these assets because they are all savings instruments issued by banks (or, in one case, a credit union). Petitioner asserts that these assets, having a liquid value of almost $394,000 in their present form will yield monthly income of $148.93. Since the community spouse's income is $859.84 below the MMMNA, the income produced by reallocating all of the couples' assets to the community spouse will not put her income over (or anywhere near) the MMMNA.

~~It is just that point that leads me to express some very serious reservations about this appeal. The couples' resources consist entirely of savings instruments ranging from passbook savings accounts to certificates of deposit. The interest rates on these instruments range from 0.1% for passbook accounts to 2.38% on several of the certificates of deposit. The overall return on these assets is *0.45% per annum*, less than one-half of one percent. $114,245.51 held in a savings account at 0.4% interest is expected to generate $38.08 of income per month; this is less than the interest generated by a certificate of deposit having a principal of only $19,277.78 (about *one sixth* as large) but paying 2.38%. If the portfolio were brought up to level where it was making 1.5% (about the rate being paid on 9-month certificates of deposit), it would generate $509 per month which would still leave the community spouse over $300 shy of the MMMNA. By comparison, the reallocation cases determined by the Division of Hearings and Appeals during 2009 and the first months of 2010[+], show that we have allocated income-producing assets having much higher returns:~~

~~**Case Number**~~	~~**Principal**~~	~~**Monthly Income**~~	~~**Annual Return**~~
~~MRA-36/109249~~	~~$141,418.61~~	~~$697.83~~	~~5.92%~~
~~MRA-67/109562~~	~~122,928.25~~	~~170.59~~	~~1.67%~~
~~MRA-32/104866~~	~~110,427.84~~	~~c. 500.00~~	~~5.43%~~
~~MRA-36/104904~~	~~194,865.93~~	~~508.00~~	~~3.12%~~
~~MRA-40/102046~~	~~165,934.94~~	~~283.31~~	~~2.05%~~
~~MRA-40/105926~~	~~148,522.05~~	~~225.45~~	~~1.82%~~
~~MRA-44/103116~~	~~77,001.07~~	~~368.06~~	~~5.74%~~
~~MRA-44/108428~~	~~99,789.34~~	~~521.12~~	~~6.27%~~
~~MRA-52/103785~~	~~231,146.92~~	~~649.16~~	~~3.37%~~
~~MRA-56/105993~~	~~176,128.04~~	~~660.90~~	~~4.50%~~
~~MRA-68/104677~~	~~75,105.22~~	~~159.02~~	~~2.54%~~

~~The *lowest* rate of return in this group is more than three times higher than that proposed by the Petitioner. The assets in MRA-44/103116 are worth one-fifth of those at issue here and yet they produced more than twice as much income. Moreover, this is not a situation in which there are varying levels of risk aversion. Petitioners in other cases realized returns with a relatively conservative mix of annuities and mutual~~

[1] See the DHA website at http://dha.state.wi.us/home/

~~funds. And, as stated above, one could triple this Petitioner 's return simply by moving up to the shortest term certificate of deposit issued by a bank.~~

~~The conclusion that suggests itself here is that Petitioner is not so much interested in the spousal impoverishment rules in terms of providing income to the community spouse. With the resources at his disposal he could have easily and safely invested them so that the community spouse's income reached the MMMNA and this, in my view, is the clear purpose behind Wis. Stats. §49.455. What is disturbing is that this appears to be an attempt to shield the assets from being consumed to cover part of the cost of Petitioner's care. The more conservative the investments, the more assets need to be allocated to the community spouse and fewer assets are available for the care facility. As a result, I believe that the proposed allocation is contrary to the purposes of the statute and is an attempt by a family who, by all appearances is considerably better off than most of the people who pass through this process, to obtain benefits from the state without acknowledging their obligation to cover a share of the cost.~~

Petitioner 's rehearing request maintains that the original Division of Hearings and Appeals decision in this matter erred in that Division of Hearings and Appeals has no authority to tell an Medicaid applicant how to invest. I do not, however, need to address this issue in this case as the matter is resolvable on a very practical, factual level.

The MMMNA was $2,428.33 at the time of the original decision. After allocating all of Petitioner 's income (again, less a personal needs allowance and Medicare, prescription and medical insurance premiums) to his community spouse, her monthly income was $1,739.93 and short of the MMMNA by $859.84 per month and that situation did not change over the period involved here in any way that would impact this decision. To bring income from Petitioner's investments to $860 a month would require a return of just over 2.6% on the entire $394,000. With permission from Petitioner's attorney I have reviewed the United States Treasury website for historical data as to returns on U.S. Treasuries and Bankrate.com for historical date on bank certificates of deposit. See http://www.treasury.gov/resource-center/data-chart-center/interest-rates/Pages/Historic-LongTerm-Rate-Data-Visualization.aspx & h ttp://www.bankrate.com/finance/cd-rates-history-0112.aspx.

To lock in a 2.6% rate of return would have required that the funds be invested for a 4-5 year period no later than February or March 2009. After that rates dropped steadily, making it even less possible to generate income here that, allocated to the community spouse, would bring her income to the MMMNA. Thus I am concluding that it was not possible to earn a rate of return that would have generated enough income to raise the MMMNA of the community spouse to the minimum without taking excessive risks.

I also note the following language from Division of Hearings and Appeals case # MRA-31/67298, adopted as final by Diane Welsh, Deputy Secretary of the Department of Health and Family Services on June 9, 2005, at page 4:

> The amount of assets the community spouse is allowed to keep (the CSRA) can be only as great as the amount of assets it is expected will be necessary to produce the income necessary to bring the Community Spouse's monthly income up to the MMMNA without excessive risk given current financial and economic conditions. This is the "Expected Income Rule". See, DHA Case No. MRA-68/48394 (Wis. Div. Hearings & Appeals Proposed Decision On Remand From Circuit Court March 26, 2003) (DHFS) [Exhibit #5]; See also, *Wisconsin Department of Health and Family Services v. Blumer*, 534 U.S. 473, 122 S.Ct. 962 (decided February 20, 2002) [Blumer II], reversing *Blumer v. DHFS*, 2000 WI App 150, 237 Wis. 2d 810, 615 N.W.2d 647 (Ct.App. decided June 8, 2000) [Blumer I].

I am, therefore, reversing the earlier decision and authorizing the allocation of Petitioner 's assets to his community spouse as of the original Medicaid application.

CONCLUSIONS OF LAW

~~Where a couples' assets were invested so conservatively as to produce virtually no meaningful income, the transaction is an attempt to use the spousal impoverishment rules shield assets and not to provide an adequate income to the community spouse.~~

For the reasons discussed above, the CSRA of Petitioner 's spouse may be increased to include all available assets of Petitioner.

THEREFORE, it is ORDERED

That ~~the petition for review herein be and hereby is dismissed.~~ this matter is remanded to the agency with instructions to increase Petitioner 's community spouse's CSRA effective September 1, 2009 by allocating all of Petitioner 's assets to her. This is to be done within 10 days of the date of this decision.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to Circuit Court, the Respondent in this matter is the Department of Health Services. Appeals must be served on the Office of the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Room 651, Madison, Wisconsin 53703. The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee,
Wisconsin, this 11th day of March, 2013

_____

\sDavid D. Fleming for Michael A. Greene
Administrative Law Judge
Division of Hearings and Appeals

c: Rich Albertoni, DHS/DHCAA Director - email
Suzanne Bach, DHS -Bureau Of Health Care Eli gibility - email
DHCAA-BEMFAIRHEARINGS DHS, BEM Fair Hearings - email
Karla Fajembola, Family Care Program - email
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State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on March 11, 2013.

Milwaukee County Department of Human Services
Division of Health Care Access and Accountability